No. 652

Supreme Court of the United States

Supreme Court, U. S.
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TERM, 1950

No. 12939

ANDREW KJAR and KATHERINE D. KJAR
(now deceased)
Petitioners,

versus

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF OF PETITIONER.

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ANDREW KJAR and KATHERINE D. KJAR
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Petitioners,

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THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF UNITED STATES COURT OFAPPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement of Case

This case is an aftermath of a large informers Case which developed in the early part of 1938 by two Informers, one Richard A. Bailey, Savannah, Ga. and one Homer Jones, Special Agent.

Now we must assume, that this Agent was sent from Washington to investigate Income Tax against the Kjar family. (he said he was) but instead he involved himself with one Richard A. Bailey to produce 18 false manifests for ship loads of distilled Spirits and which they both swore were correct.

The Commissioner of Internal Revenue, made large In-

come Taxes and later Spirit Taxes on these false socalled (invoices or original manifests.)

The Taxes were made under the jeopardy Provision, and all Property and Stocks in the Kjar family were sold in the slump and the market crash. Stocks were sold by what the government calls wash sales. There was only one bidder.

All of the Distraints violated the jeopardy Provision, by not allowing Bond, all of these Distraints except one are riding the shelves in Court of Claims, together with Photostatic Copies of at least 12 of the false manifests, and at least 52 other exhibits introduced in that court.

We are suffering from the fact that the government will not deny, that these false papers actually are in existence. If the government would at least offer some explanation for their silence it would be of great satisfaction to us. We believe that the government's complete silence on all these false papers is to impress on all judges, that the point is not important and that it should be believed by the honorable judges that it is only some foolishness by us.

We were allowed to appeal to the Tax Board, but that Court took nearly three years to render decision. The discovery in that court, that the Commissioner had only the two Informers and their false manifests came too late to save any of our property and stocks.

The Commissioner of Internal Revenue decided these was an over-payment of $16,025 for income tax and for which he made out two checks, and sent two armed deputies to Savannah, to demand that we endorse same. This was refused by us. This happened Navy Day 1942. The two deputies came from the Collectors Office, Atlanta, Ga. The two checks were clamped to a lot of papers with only a small opening for us to sign. The papers to which the checks were fastened might have been distilled Spirit Tax Assessments.

The Commissioner's action of taking our money, and

which he had collected by jeopardy proceedings, was illegal (Section 322). We started action in Court of Claims against the United States.

The Justice Department counterclaimed with four assessments for importation of distilled spirits. The four assessments cover five years of importation and are running mostly concurrently and are in violation of (Section 900 R.A. 1926 and 1928 subsection 5). These assessments are introduced in the Supreme Court under the name of original documents.

Court of Claims threw out these assessments as being a theory and expression, that they were contradictory, and hence, formed no basis for the rendition of a judgment by Court of Claims.

The judges cite the case of *John J. McClure v. United States* 98 C. Cls. 381. 391.

There can be no question that the commissioner counterclaim based on the four assessments (introduced as original papers) was thrown out, and that the internal revenue should have released our overpayment with interest and released some unsold stocks and dividends now held more than eleven years, and seized for income tax which was not owed. However, Court of Claims rendered a judgment in favor of the Commissioner in the same amount as he demanded in his four assessments, and called it (the non beverage tax.)

The Justice Department has rendered an execution order against Petitioner, in the amount of $114,000.00 for this, (the non beverage tax.)

As this (the non beverage tax) is not on the Statute Books or the Tariff Act, we believe it to be unconstitutional and we therefore have started suit in the District Court, Savannah, Ga. to have this large judgment together with five other points in our petition set aside.

Arguments

Point One

The district judge in Savannah threw out the case because he said, Courts of Claims Case was resjudicate and that he could not try it again. Our petition is carefully numbered 1 to 8 and in no place do we ask the judge to reopen a Court of Claims Case.

Constitutional Rights Involved

Point Two

Was Judge Scarlett justified in denying us a jury hearing, a right granted us by the Sixth and Seventh Amendment to the Constitution. Was Judge Scarlett justified in refusing Petitioners an opportunity to present his case to the court, even if he was not a qualified attorney. Was it within the dignity of the court, that, Scott Edwards, the Clerk of the Court came over and pushed Petitioner away from the council table. Petitioner had a lot of papers spread out over the council table, and these papers were saved by Petitioner's secretary, one Miss Mabel Levison, (public stenographer.)

Point Three

Constitutional right is again involved. Are we entitled to appeal to a District Court and a jury, to set aside a judgment against Petitioner, $114,000.00 for (the non beverage tax) when such a tax is not listed on the Internal Revenue Code books, or the Tariff Act, and caused by great irregularity by Court of Claims, and we therefore believe this tax, and judgments are unconstitutional.

Point Four

Constitutional right and statutes is again involved, and a decision by the Supreme Court, is very important.

A. Were the judges in their right to render judgment on taxes not authorized by Congress.

B. Were the judges authorized to render judgment (for the non beverage tax) when this tax was not counterclaimed

with, and not mentioned in court. There are five large books, transcripts from seven hearings in Court of Claims, but no place do the transcripts mention (the non beverage tax) all of these transcripts are in my possession and can be introduced if a hearing is granted us.

POINT FIVE

The original and certified Exhibits.

1. A closing argument with Mrs. Mary M. Thompson-Jenkins is clearly defined. Total liability $35,557.50. Acceptance offer $5000.00 and Plaintiff has settled with Mrs. Jenkins for half of that amount.

2. We must assume that after these certified exhibits, have been brought up as original proof of cancellation, that the government has reexamined the papers, and has discovered the mistake. They now claim that the taxes were cancelled by mistake. However, that the taxes were cancelled by mistake, is a far cry from the counterclaim, with which they won a decision, because they said the assessment was outstanding and unsatisfied on the collectors book. Please examine Exhibit No. 5.

3. The assessment was thrown out by the court, but the same amount was allowed the Commissioner for (the non beverage tax) whatever that might be.

POINT SIX

1. Exhibit No. 9, letter from Willard Hart, Clerk of Court of Claims, confirming that the Exceptions was filed August 22, 1946. Court of Claims in Exhibit No. 14, says, Plaintiffs filed no Exceptions to the Commissioners finding and therefore the court made a similar finding. The judges cite the case, Rule 46; (*Schnoll v. United States*, 105 C. Cls. 415, 456.)

2. It is a very serious matter when the most important records disappear from a court. The Appeal Court, says in its Opinion (Page 62 of the Record.) And the Court of Claims

is the proper tribunal to investigate and reestablish, if need be, anything lost or destroyed from its own records.

3. We have no power to investigate Court of Claims, unless we can obtain an order from United States Supreme Court.

4. The Appeal Court says in its Opinion (Page 63 of the Record) it may be, that Court of Claims has power to grant a new trial for newly discovered evidence.

POINT SEVEN

1. The Appeal Court says Page 63 (fol. 66) there is a vague contention that the assessments were partly based on false manifests of importation, and that the false manifests ought to have been presented to Court of Claims.

2. We cannot with any certainty say how many false manifests were made up by the informers, they may run as high as seventy, but as far as our proof goes, is 12 photostatic copies which we have required through the Tax Board.

3. On these 12 photostatic copies we had discovered the handwriting of one Chesley Tutens, brother-in-law of Richard Bailey, the informer, and only witness for the government.

4. On discovery of Chesley Tutens' handwriting on these false manifests, we forced Chesley Tuten, up in Court of Claims as a witness (and which is a dangerous thing to do), him being a close relative and partner of the informer.

5. Court of Claims hearing, Savannah, Ga., February 27-28, 1945. Tr. Page 28.

BY MR. KJAR

Q. 12. The question was: . . .

MR. SHEPPARD: Wait, let the Reporter read it.

Thereupon, the Reporter read the pending question.

THE WITNESS: I don't know anything about a

manifest. That is a bill for the whiskey is all that I know.

By The Commissioner

Q. 13. What is that?

A. It is a bill for the whiskey.

Q. 14. Do you know anything about it?

A. I know these are bills for whiskey.

Q. 15. That is all you know about it?

A. Yes.

Q. 16. Can you identify it as something you know about?

A. There is some of my handwriting on some of them.

By Mr. Kjar:

Q. 17. Would you be able to tell the court whether that would be whiskey that I had bought?

Tr. 30

The Commissioner:

Now, Mr. Witness, you are testifying from personal knowledge?

The Witness: Yes, Sir.

The Commissioner:

I want to keep this testimony straight.

The Witness: There is nothing on here that I could testify that you were connected with, no sir.

This important testimony of Chesley Tuten was not reported in the Commissioner's findings.

One Laurie Tomlinson, a high official on the Collector's office, Jacksonville, Florida, perjured himself to defraud Mrs. Kjar (now deceased) of her last penny and Court of Claims did not award Mrs. Kjar interest 6% on overpayment held more than 10 years. The statute provides six per cent, $3,600.00 is due Mrs. Kjar.

Mrs. Kjar was never paid for her furnishings, furniture and personal effects, which was another sale. Where the money

disappeared to, we don't know only that she has not received either money or accounting. The money may still be laying in the Collectors Office, Jacksonville, Fla., (we don't know). We have never received certificates of over assessments except from the Collector of Internal Revenue, San Francisco where we overpaid our income tax with approximately $900.00.

SECTION 900 R.A.—1926 AND 1928

There is something no one can understand, the judges will not read enough of that Section, they stop before they come to where it says, except that such collection and depositing shall be by the Collector of Customs instead of by the Collector of Internal Revenue.

There is proof in the Certified Exhibits, that the Collector of Internal Revenue, assessed for 5 years importation of distilled spirit, to which he had no jurisdiction.

1. The Commissioner of Internal Revenue violated the jeopardy provision (Section 322) by not immediately refunding the overpayment to the taxpayer and without the taxpayer filing a claim therefore.

2. Overpayment of income taxes may be credited against income and profits taxes only: "432. C. C. H, (1563.)"

3. It is well settled that in case of doubt, taxing statutes should be construed in favor of the taxpayer. "432 C. C. H. (1874.04.)"

4. The Commissioner's (R.26) findings (the Tax Boards findings) the Board also found that during the years 1929-1931-1932, Kjar had not been engaged in the purchase and sale of liquor. But Commissioner Akers also found (R.24) that Kjar in 1930 went to Canada where he remained the entire year. Akers said petitioner fled.

5. However this would make 4 years that petitioner was not in the liquor business, but was wrongfully accused of having imported 116,000 gallons of distilled spirit.

The jurisdiction of this court is invoked by virtue of 28 U.S.C.A. Section 288 C. 14053 Stat. 752 and the Seventh Amendment to the Constitution.

We do not believe that Congress had intended that Section (2519 Title 28) should be used to cover up cases where fraud had been committed, neither does petitioner believe that this section was meant to induce a large unconstitutional tax against petitioner which is not owed. (The non beverage tax.)

The petitioner prays that a Writ of Certiorari will be granted, for petitioner, under the Sixth Amendment to the Constitution to demand a hearing in the District Court, Savannah, Ga. to contest unconstitutional taxes, induced by jeopardy presidings against petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 652

ANDREW KJAR AND KATHERINE D. KJAR,[1]
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 59-64) is reported in 177 F. 2d 630.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1949. (R. 64.) A petition

[1] The petition for certiorari describes Mrs. Kjar as "now deceased."

for rehearing was denied on December 10, 1949. (R. 70.) The petition for certiorari was filed on March 6, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Where the taxpayers' complaint showed on its face that the issues raised had been finally decided adversely to taxpayers by the Court of Claims, whether the Court of Appeals erred in affirming the order of the District Court dismissing the complaint.

STATUTE AND RULES INVOLVED

28 U. S. C.:

> SEC. 2519. *Conclusiveness of judgment*
>
> A final judgment of the Court of Claims against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy.

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 900. Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:
>
> "SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller

or importer when withdrawn, and collected under the provisions of existing law:

* * *

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

"(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

* * *"

Rules of Civil Procedure:

RULE 10. FORM OF PLEADINGS.

* * *

(b) PARAGRAPHS: SEPARATE STATEMENTS. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable

to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

* * *

RULE 12 [effective March 19, 1948]. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS.

* * *

(f) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

STATEMENT

The facts are set forth in the opinion of the Court of Appeals (R. 59-64) and in the earlier opinion of the Court of Claims (*Kjar* v. *United States,* 69 F. Supp. 406, certiorari denied, 332 U. S. 768).[2] The

[2] The difficulties involved in piecing together the pertinent facts of this litigation were described as follows in the opinion of the Court of Appeals (R. 60):

> Both in the Court of Claims and in the District Court, though the litigation involved many thousands of dollars,

taxpayers filed a petition with the Board of Tax Appeals (later the United States Tax Court) for a redetermination of income taxes for the years 1928 to 1932, involving gains from sales of distilled spirits. The Board determined that taxpayers had overpaid their income taxes by $16,025.59.[3] Refund checks were issued but not paid because of assessments which had been made in 1935 and 1939 for distilled spirits taxes in a much larger sum. To enforce collection of such assessments, the Collector in 1940 seized stocks and bonds of taxpayers in the hands of their brokers. After failure of an effort to compromise, taxpayers filed suit in the Court of Claims against the United States to recover the overpayments as found by the Board. The United States did not dispute the overpayments of income taxes but set up by way of counterclaim liability for distilled spirits taxes assessed under Section 900 of the Revenue Act of 1926, on the basis of $1.10 a gallon in the aggregate amount of $96,710.70. (R. 60-61.)

The opinion of the Court of Claims recited that the United States alleged in its counterclaim that taxpayers owed distilled spirits taxes at the rate of

---

the Kjars had no lawyer, but Mr. Kjar acted throughout for himself and wife, as he has in this court, though admitting that he is not a member of the bar of any court, nor educated in law. The District Judge suggested, indeed insisted, that he get the assistance of a lawyer, but the suggestion was declined. This has resulted in great embarrassment in the District Court, and here, in trying to understand the contentions made and the relief sought.

[3] *Kjar* v. *Commissioner*, decided September 30, 1941 (1941 P-H B.T.A. Memorandum Decisions, par. 41,446).

$6.40 a gallon, on the theory that the distilled spirits involved had been diverted to beverage purposes, and also customs duties of $5 a gallon on the theory that the liquor was smuggled into the United States. The Court of Claims decided that, while the United States was not entitled to recover "beverage" taxes at the rate of $6.40 a gallon and the customs duties, it was entitled to recover so-called "non-beverage" taxes [4] on the basis of $1.10 a gallon as assessed. It thereupon rendered judgment in favor of the United States against the taxpayer, Andrew J. Kjar, for $100,685.11, plus interest, and dismissed taxpayers' petition. *Kjar* v. *United States,* 69 F. Supp. 406, 409, certiorari denied, 332 U. S. 768. Subsequently on a motion for a new trial, the Court of Claims in an unreported opinion on May 5, 1947, modified its decision, increasing the amount of the judgment against Andrew J. Kjar to $106,685.11, plus interest, and holding that Katherine D. Kjar was entitled to a refund of $6,000. *Kjar* v. *United States* (36 A. F. T. R. 1593).

After certiorari was denied, 332 U. S. 768, No. 232, Oct. Term 1947, taxpayers filed the present suit against the United States (R. 1-7) in the District Court for the Southern District of Georgia,

---

[4] The terms "beverage tax" and "non-beverage tax" are explainable by the terms of Section 900 of the Revenue Act of 1926, which amended Section 600 (a) (3) and (4) of the Revenue Act of 1918, *supra,* p. 3, to impose the tax at the rate of $6.40 a gallon on distilled spirits diverted to beverage purposes and at the rate of $1.10 a gallon on such spirits not so diverted.

seeking to cancel the judgment rendered by the Court of Claims in favor of the United States against taxpayer Andrew J. Kjar.

The complaint alleged, *inter alia,* that the Commissioner had wrongfully sold property valued at more than $100,000 for only a fraction of its value and had kept the proceeds; that the Commissioner of the Court of Claims knowingly accepted perjured testimony by a Government official; that such Commissioner filed a false report showing that certain assessments were unsatisfied, while in fact they had been cancelled (R. 1-2); that taxpayers filed exceptions to the Commissioner's report but the court destroyed the exceptions and stated that they were not filed; that the counterclaim of the Government was based on assessments on the strength of manufactured false invoices (R. 3); that the taxpayers appealed to this Court but the appeal was premature because it was not discovered at that time that the Court of Claims had destroyed taxpayers' records; that the large non-beverage tax which they were denied the right to defend against was "invented" by four judges of the Court of Claims (R. 4-5); that the taxes were unconstitutional and in fact not on the statute books (R. 4); and that the judgment was "perputated [sic] by fraud, perjury, and at the cost of destroying or misplacing our Records in Court of Claims" (R. 5). Taxpayers prayed that the judgment entered by the Court of Claims be cancelled and that they have

judgment against the United States for $350,000 in damages for money, property, and stocks illegally taken and for mental strain and sickness. (R. 5-7.)

After hearing argument (R. 17-37), the District Court, sustaining the Government's motion, dismissed the complaint in its entirety (R. 37-38). Upon taxpayers' appeal (R. 39) the order of dismissal was affirmed by the Court of Appeals (R. 59-64).

ARGUMENT

The ruling below is clearly correct; the issues raised relate only to the particular facts of this litigation; and no conflict of decisions is presented.

1. The Court of Appeals correctly affirmed the order of the District Court dismissing the taxpayers' complaint. The complaint disclosed on its face that taxpayers were seeking only to relitigate taxpayer Andrew Kjar's liability for the distilled spirits taxes which had already been determined by the final judgment of the Court of Claims. Section 2519, 28 U.S.C., *supra*, p. 2, provides that a final judgment of the Court of Claims is conclusive against a plaintiff and shall forever bar any further claim, suit or demand against the United States arising out of the matters involved in the case or controversy. Moreover, under familiar principles of *res judicata*, the former final judgment of the Court of Claims is a complete bar to this suit. *Commissioner* v. *Sunnen*, 333 U. S. 591; *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620; see *Parker Bros.* v. *Fagan*, 68 F. 2d 616 (C.A. 5th), certiorari

denied, 292 U.S. 638; *Kelly* v. *United States,* 90 F. 2d 73 (C.A. 3d), reversed on other grounds, 300 U.S. 50. As the court below held (R. 63), if taxpayers could show that fraud, perjury, or other misconduct underlay the judgment of the Court of Claims, their remedy would have been to apply to the Court of Claims for correction, rather than to attack the judgment collaterally in another court.

2. Taxpayers were not denied any constitutional right in not receiving a jury trial. Their complaint did not state a cause of action triable in the District Court, and no issue of fact to be resolved by a jury was presented. Moreover, the right to trial by jury is expressly withheld by 28 U.S.C., Section 2402, in actions against the United States in the District Courts under 28 U.S.C., Section 1346, the jurisdictional provision under which this suit was brought.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APRIL, 1950.

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